A

SAUL HAMID PAKIR MOHAMAD

v.

INSPEKTOR ABDUL FATAH ABDUL RAHMAN & ANOR

B

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ MOHAMAD JCA
MOHD GHAZALI YUSOFF JCA
ZULKEFLI MAKINUDIN JCA
C [CIVIL APPEAL NO: P-01-61-1999]
20 JULY 2007

CRIMINAL PROCEDURE: *Arrest - Validity - Arrested for offences under ss. 323 and 390(2) Penal Code - Whether arrest lawful*

D

POLICE: *Arrest - Validity - Conflicting police reports lodged - Investigating officer chose one over the other - Whether officer's grounds on reasonable suspicion justified - Whether arrest under ss. 390(2) and 323 Penal Code lawful*

E

This appeal arose from the learned judge's dismissal of the appellant's claim against the respondents for wrongful arrest, wrongful detention and malicious prosecution (See High Court case [1999] 1 LNS 83; see also [1987] CLJ 967 (Rep)/[1987] 2 CLJ 257). The main issue for determination was whether the
F appellant's arrest by the 1st respondent for alleged offences under ss. 392 and 323 of the Penal Code ('PC') was lawful. The facts showed that two conflicting reports were lodged by one Sukah Singh ('SS') and the appellant in relation to an incident wherein SS claimed he was assaulted and robbed by the appellant whilst
G the appellant claimed otherwise. The 1st respondent who was the investigating officer chose to believe SS's version over that of the appellant and arrested and detained the appellant for investigations. The appellant had since been acquitted and discharged of the said offences. Hence, the appellant's claim
H against the respondents.

Held (dismissing the appeal):
Per Abdul Aziz Mohamad JCA (now FCJ)

I

(1) The acts alleged against the appellant constituted one incident or transaction. It was arguably a robbery. The allegation of taking the money was an allegation of theft. According to s. 390(2) PC theft was robbery if there was an element of

causing hurt in the alleged incident. Robbery was a seizable offence. The arrest of the appellant for robbery was lawful. The appellant fell under lawful custody. The fact that the 1st respondent treated the alleged causing of hurt as a separate offence under s. 323 PC, which was not a seizable offence, did not affect the lawfulness of the appellant in custody for the offence of robbery. (para 13)

(2) There were fair reasons given by the 1st respondent for preferring SS's version to that of the appellant's. Based on all the factors the 1st respondent took into account, he was entitled, on a reasonable suspicion, to arrive at the decision that the appellant did commit the offences alleged against him. (para 20)

(3) If an arrest is made when it is not necessary to arrest (because the person concerned is not likely to escape, commit a further crime or obstruct police enquiries, and investigation can as expeditiously be carried out without arresting him), the arrest is not unlawful. If that were the law, it would hamper police action and place an almost impossible burden on a police officer every time before making an arrest of weighing carefully whether an arrest is or is not necessary. (para 25)

Per Zulkefli Makinudin JCA (Ghazali Mohd Yusoff JCA concurring):

(1) The investigation by the 1st respondent was not only for the offence under s. 323 PC but also for the offence under s. 392 PC. Since the appellant was investigated on the suspicion of committing the offence of robbery under s. 392 PC, a seizable offence, the 1st respondent was justified to arrest the appellant without warrant. (paras 39 & 40)

(2) The offences under ss. 392 and 323 PC were committed in the same transaction. There need be only one arrest effected by the 1st respondent and the 1st respondent lawfully exercised his power by arresting the appellant with a view to investigating the offence under s. 392 PC. The 1st respondent did not need a warrant to effect another arrest for investigating the offence under s. 323 PC. Furthermore, the Explanatory Note No. 2 to the First Schedule of the Criminal Procedure Code ('CPC') stated that the entries in the third

column of the said schedule were not intended in any way to restrict the powers of arrest without warrant which might be lawfully exercised by police officers. (para 40)

(3) The 1st respondent referred the result of his investigation to the DPP for further directions. The DPP had in fact taken cognizance when the DPP instructed the police to charge the appellant for the offences under ss. 323 and 392 PC. Further, the appellant's remand for nine days was for investigation purposes for both offences under ss. 392 and 323 PC. For that reason, the 1st respondent could not be held responsible for wrongful arrest and false imprisonment. (paras 41 & 42)

(4) The 1st respondent acted reasonably in his decision before arresting the appellant because at the time of arrest the reasonable suspicion was that the 1st respondent believed the report of SS as being true and not that of the appellant's. (para 44)

(5) The learned judge was right in deciding that the failure of the appellant to put his case or challenge the evidence of SS and his friend who were both at the scene of the incident was fatal to the appellant's case. Further, the appellant's version of the incident was never put to SS and his friend. In the circumstances, the learned trial judge was correct in accepting SS's version. It followed that the decision to arrest the appellant was lawful and with reasonable cause. It was entirely upon the 1st respondent's discretion to arrest the appellant. What was reasonable to the 1st respondent was for him to determine. (paras 47 & 48)

(6) The 1st respondent did not have the burden to show as to why investigation could not be carried out without the arrest and detention of the appellant, if it could be shown that the 1st respondent's decision to arrest the appellant was lawful and with reasonable cause. The issue was whether the arrest was reasonable and not the manner of investigation. (para 49)

(7) The learned judge made a finding of fact that the arrest of the appellant was lawful in the circumstances of the case. The police report by SS was the basis of the investigation by the 1st respondent and as held in *Shaaban & Ors v. Chong Fook Kam*, suspicion could take into consideration matters that could not be put into evidence at all. (para 50)

(8) On the issue that the 1st respondent as the investigating officer failed to look at the appellant's bicycle which would have indicated damage consistent with the appellant's story, the appellant never put the relevant question to the 1st respondent. As such, it would be too late in the day for the appellant to raise the issue now (*Browne v. Dunn* referred). (para 51)

Bahasa Malaysia *translation of headnotes*

Rayuan ini berbangkit dari penolakan tuntutan perayu terhadap responden oleh yang arif hakim kerana penangkapan salah, penahanan salah dan pendakwaan niat-jahat (lihat kes Mahkamah Tinggi [1999] 1 LNS 83; lihat juga [1987] CLJ 967 (Rep)/[1987] 2 CLJ 257). Isu utama untuk diputuskan adalah sama ada penangkapan perayu oleh responden pertama kerana dikata melakukan kesalahan di bawah ss. 392 dan 323 Kanun Keseksaan ('KK') adalah sah. Fakta menunjukkan bahawa dua laporan (polis) yang bercanggah telah dibuat oleh seorang Sukah Singh ('SS') dan perayu berkaitan suatu insiden di mana SS mendakwa beliau telah diserang dan dirompak oleh perayu manakala perayu mendakwa sebaliknya. Responden pertama, iaitu pegawai penyiasat memilih untuk mempercayai versi SS dan tidak versi perayu dan berikutnya telah menangkap perayu untuk siasatan. Perayu kemudian telah dilepas dan dibebaskan dari kesalahan-kesalahan. Perayu dengan itu membuat tuntutan di atas terhadap responden-responden.

Diputuskan (menolak rayuan):
Oleh Abdul Aziz Mohamad HMR (kini HMP)

(1) Perbuatan-perbuatan yang didakwa terhadap perayu merupakan satu insiden atau transaksi. Ia nampaknya adalah suatu rompakan. Alegasi pengambilan wang adalah satu alegasi mencuri. Menurut s. 390(2) KK, kecurian adalah rompakan jika terdapat elemen menyebabkan kecederaan dalam insiden berkenaan. Rompakan adalah satu kesalahan boleh tangkap. Penangkapan perayu kerana merompak adalah sah. Perayu berada di bawah penahanan yang sah. Fakta bahawa responden pertama menganggap perbuatan melakukan kecederaan yang didakwa itu sebagai suatu kesalahan berasingan di bawah s. 323 KK, yang bukan satu kesalahan boleh tangkap, tidak menjejaskan kesahan penahanan perayu atas kesalahan rompakan.

(2) Alasan-alasan yang munasabah telah diberi oleh responden pertama kerana mempercayai versi SS berbanding versi perayu. Mengambilkira semua faktor yang dipertimbang oleh responden pertama, beliau berhak, berasaskan syak wasangka yang munasabah, untuk mencapai keputusan bahawa perayu telah melakukan kesalahan yang didakwakan terhadapnya.

(3) Jika penangkapan dibuat di mana penangkapan adalah tidak perlu (disebabkan orang berkenaan tidak mungkin melarikan diri, melakukan jenayah lain atau menghalang siasatan polis, dan suatu siasatan yang cepat boleh dilakukan tanpa menangkapnya), penangkapan tidak boleh dikatakan tidak sah. Jika itulah undang-undangnya, maka ia akan menghalang tindakan polis dan meletakkan satu beban yang mustahil ke atas seorang pegawai polis untuk terlebih dahulu menimbang dengan cermat sama ada sesuatu tangkapan itu perlu ataupun tidak sebelum melakukan tangkapan setiap kali hendak melakukan tangkapan.

Oleh Zulkefli Makinudin HMR (Ghazali Mohd Yusoff HMR menyetujui):

(1) Penyiasatan oleh responden pertama bukan semata-mata untuk kesalahan di bawah s. 323 KK tetapi juga untuk kesalahan di bawah s. 392 KK. Oleh kerana perayu disiasat atas syak melakukan kesalahan di bawah s. 392 KK, satu kesalahan boleh tangkap, maka responden mempunyai justifikasi untuk menangkap perayu tanpa waran.

(2) Kesalahan-kesalahan di bawah ss. 392 dan 323 KK dilakukan dalam transaksi yang sama. Responden pertama hanya perlu melakukan satu tangkapan sahaja dan beliau sudahpun melaksanakan kuasanya dengan menangkap perayu untuk maksud penyiasatan bagi kesalahan di bawah s. 392 KK. Responden pertama tidak memerlukan waran untuk melakukan tangkapan lain bagi menyiasat kesalahan di bawah s. 323 KK. Selain itu, Penjelasan Nota No. 2 kepada Jadual Pertama Kanun Acara Jenayah ('KAJ') menyatakan bahawa butiran-butiran di ruangan ketiga jadual tersebut tidak dengan apa cara sekalipun bermaksud untuk menyekat kuasa-kuasa menangkap tanpa waran yang dilaksanakan dengan sahnya oleh pegawai-pegawai polis.

(3) Responden pertama telah merujuk keputusan penyiasatannya kepada TPR untuk arahan lanjut. TPR pula telah mengambil cognizance bilamana mengarahkan pihak polis untuk mendakwa perayu untuk kesalahan-kesalahan di bawah ss. 323 dan 392 KK. Selain itu, penahanan perayu untuk tempoh sembilan hari adalah bagi maksud penyiasatan bagi kedua-dua kesalahan ss. 392 and 323 KK. Atas alasan ini, responden pertama tidak boleh dikata telah melakukan penangkapan salah atau penahanan salah.

(4) Responden pertama bertindak secara yang munasabah dalam keputusannya sebelum menangkap perayu kerana semasa tangkapan, syak wasangka yang munasabah adalah bahawa responden pertama mempercayai laporan SS sebagai benar dan bukannya laporan perayu.

(5) Yang arif hakim betul dalam memutuskan bahawa kegagalan perayu mengemukakan kesnya atau mencabar keterangan SS dan kawannya di mana kedua-dua mereka berada di tempat kejadian adalah fatal kepada kes perayu. Selain itu, versi perayu mengenai insiden tersebut tidak pernah dikemukakan kepada SS dan kawannya. Dalam keadaan sedemikian, yang arif hakim betul dalam menerima versi SS. Ianya mengikut bahawa keputusan untuk menangkap perayu adalah sah dan dibuat atas alasan yang munasabah. Menangkap perayu adalah terletak atas budi bicara responden pertama sepenuhnya. Apa yang munasabah bagi responden pertama adalah ditentukan olehnya sendiri.

(6) Tidak ada beban atas responden pertama untuk menunjukkan mengapa penyiasatan tidak dapat dilakukan tanpa penangkapan dan penahanan perayu, jika ianya dapat dibuktikan bahawa keputusan beliau untuk menangkap perayu adalah sah dan dibuat dengan alasan munasabah. Isunya adalah sama ada penangkapan, dan bukannya cara penyiasatan, adalah munasabah.

(7) Yang arif hakim telah membuat dapatan fakta bahawa penangkapan perayu dalam halkeadaan yang wujud adalah sah. Laporan polis oleh SS menjadi asas bagi penyiasatan oleh responden pertama dan seperti yang diputuskan di dalam *Shaaban & Ors v. Chong Fook Kam*, syak wasangka boleh mengambilkira hal-hal yang langsung tidak boleh dikemukakan sebagai keterangan.

A **(8)** Berkaitan isu bahawa responden pertama selaku pegawai penyiasat gagal melihat kepada basikal perayu yang menunjukkan kerosakan yang konsisten dengan cerita perayu, soalan yang relevan tidak pernah dikemukakan oleh perayu kepada responden pertama. Oleh itu, adalah terlalu lewat
B untuk perayu membangkitkan isu ini sekarang (*Browne v. Dunn* dirujuk).

Case(s) referred to:
Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Another Appeal [1995] 3 CLJ 639 CA ***(refd)***
C *Browne v. Dunn [1893] 6 R 67* ***(refd)***
Chong Fook Kam & Anor v. Shaaban & Ors [1965] 1 MLJ 50 ***(refd)***
Shaaban & Ors v. Chong Fook Kam & Anor [1969] 2 MLJ 219 ***(refd)***

Legislation referred to:
D Criminal Procedure Code, ss. 2, 23(1)(a), 108(2), 112, 113, 114, 115, 116, 117
Penal Code, ss. 323, 390(2), 392
Police Act 1967, s. 32(1)

For the appellant - Gobind Singh Deo; M/s Karpal Singh & Co
E *For the respondents - Kamaludin Mohd Said SFC (Mohaji Selamat FC with him)*

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-106-1990]

Reported by Usha Thiagarajah
F

JUDGMENT

Abdul Aziz Mohamad JCA (now FCJ):
G

[1] As orally affirmed to us by the appellant's counsel, the appellant's action in the High Court was an action for the tort of false imprisonment.

H **[2]** The appellant was arrested on 21 March 1987 as a result of the making of the two police reports that are set out in the judgment of my learned brother, Zulkefli Ahmad Makinudin JCA. 21 March 1987 was a Saturday and the time of the arrest was 3.15pm 22 March 1987 was a Sunday, which the learned trial
I judge said was an excluded day. The appellant was produced before a magistrate at 10.30am on Monday 23 March 1987 and

was ordered to be remanded for two days under s. 117 of the Criminal Procedure Code. On 25 March 1987 the Sessions Court President (qua magistrate) extended the remand to 29 March 1987 and on that day the appellant was released on police bail.

[3] In his written Outline of Submissions in the appeal the appellant's counsel raised three issues concerning the arrest of the appellant. For the first issue, he submitted at p. 3 that "the 1st respondent had no power at that time to arrest the appellant for an offence under s. 323 of the Penal Code, which is a non-seizable offence". I shall refer to this issue as the "non-seizable-offence issue".

[4] As regards the second issue, he said at p. 8 that it is "as to whether or not the 1st respondent had reasonable suspicion to arrest the appellant". This issue is related to s. 23(1)(a) of the Criminal Procedure Code which, *inter alia*, empowers any police officer, without an order from a magistrate and without a warrant, to arrest any person against whom "a reasonable suspicion exists" of his having been concerned in any seizable offence. I shall refer to this issue as the "ground-for-arrest issue". He concluded his submission on this issue by submitting at p. 13 that "the reasons given by the 1st respondent do not justify arrest of the appellant".

[5] He then, at p. 14, quoted a passage from the Privy Council judgment of Lord Devlin in *Shaaban & Ors v. Chong Fook Kam & Anor* [1969] 2 MLJ 219, which appears at p. 221, and said, at p. 16, that "the 1st respondent offered absolutely no good reason for arresting the appellant at the time at which he arrested him" and proceeded to an examination of what transpired in the nine days during which the appellant was detained, prefacing the examination with the statement: "In fact, it can be seen from what transpired in the next nine days that there was really no urgent need to arrest the appellant". The examination went on for several pages until, at p. 23, after referring to Lord Devlin in Shaaban, the appellant's counsel contended:

> In other words, the law is clear. A police officer need not arrest a person if investigations can proceed without his arrest and detention.
>
> In this case, not an iota of evidence was led by the respondents as to why it is investigations could not be carried out without arresting and detaining the appellant.

[6] That is the third issue. The point of it is that even if there were grounds to justify the arrest, there was, judging from what happened during the period of the appellant's detention, no need to arrest the appellant. The police could have carried out their investigation and charged the appellant without having to arrest and detain him, and there was no other need to do so. I shall refer to this issue as the "need-to-arrest issue".

[7] Among the matters raised by the respondents in their submission in reply is the protection afforded by s. 32 of the Police Act 1967 to a police officer. The submission had in mind the fact that from 10.30am 23 March 1987 the appellant was detained on magisterial orders. Section 32(1) provides as follows:

> (1) Where the defence to any suit instituted against a police officer … is that the act complained of was done in obedience to a warrant purporting to be issued by any competent authority, the court shall, upon production of the warrant containing the signature of such authority and upon proof that the act complained of was done in obedience to such warrant, enter judgment in favour of such police officer …

[8] At the end of the hearing of the appeal we gave leave to counsel to send to us authorities on s. 32, partly because the appellant's counsel in his submission in reply said that he had not looked into the s. 32 point.

[9] Accordingly, after the hearing of the appeal the learned Senior Federal Counsel wrote to us to point out that in *Chong Fook Kam & Anor v. Shaaban & Ors* [1965] 1 MLJ 50 the then Federal Court had stated at pp. 52 I (right) – 53 B (left) that because of s. 32(1), an order of a magistrate authorizing detention made under s. 117 of the Criminal Procedure Code may not found a claim for damages against a police officer. There followed a letter from the appellant's counsel forwarding to us a Further Submission in which he virtually conceded that s. 32 was an effective answer as regards the detention from 10.30am 23 March 1987.

[10] The appellant's counsel thereupon ended the Further Submission as follows:

> I must however reemphasize here that the appellant, I believe, is still on strong ground in respect of the initial arrest. Firstly, as submitted earlier, he was arrested for an offence which was not an arrestable offence and secondly, as stated in Shaaban, there must be some additional ground which justifies exercise of discretion to arrest such as the possibility of escape etc, which clearly has not been shown in this case.
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> There is absolutely no reason why the first respondent could not have proceeded to investigate both reports without the need to arrest the appellant.

[11] It will be seen from that extract that counsel is persisting in only two issues, namely, the non-seizable-offence issue and the need-to-arrest issue. The ground-for-arrest issue is no longer persisted in. Therefore the issues that have to be decided in this appeal are those two issues. But as counsel might say that he had inadvertently left out mention of the need-to-arrest issue, I shall deal with it nonetheless.

The Non-Seizable-Offence Issue

[12] The information on which the first respondent arrested the appellant, which was that given by Sukah Singh in his report, was that the appellant felled Sukah Singh with his bicycle, then hit him with his hands and asked him to bring out all the money that was in his pockets, which amounted to RM14, grabbed the money from Sukah Singh's hand or hands, and pulled his knot of hair (jambul). The first respondent, who was the investigating officer, said in evidence that he arrested the appellant on suspicion of having committed the offences of robbery and causing hurt to Sukah Singh. Those would be respectively offences under ss. 392 and 323 of the Penal Code. After the appellant had been released from remand, the first respondent formed the opinion that there was sufficient evidence to charge the appellant for those offences and referred the matter to the DPP, who directed that the appellant be charged with those offences. The appellant was accordingly charged on 6 April 1987 and was tried. He was acquitted and discharged of both offences after his defence was considered.

[13] The acts alleged against the appellant actually constituted one incident or transaction. It was arguably a robbery. The allegation of taking the money was an allegation of theft. According to s. 390(2) of the Penal Code theft is robbery (which

is punishable under s. 392) "if … in order to commit theft or in committing the theft …, the offender, for that end, voluntarily causes … to any person … hurt …". The idea that it was a robbery could not have been formed if there had been no element of causing hurt in the alleged incident. Robbery is a seizable offence. As far as type of offence was concerned, the arrest of the appellant as for robbery was lawful. The appellant fell under lawful custody. The fact that the first respondent treated the alleged causing of hurt as also a separate offence under s. 323 of the Penal Code – which is not a seizable offence – and intended the arrest to be also for that offence did not, to my mind, affect the lawfulness of the appellant's being placed in custody for the offence of robbery. I think that is the short answer for this issue, for which the appellant's counsel admitted that he was unable to find any authority.

The Ground-For-Arrest Issue

[14] Although Sukah Singh's report alleged what the appellant did to him at 10am and the appellant's report alleged what Sukah Singh and his two brothers did to him later at 12.40pm, so that there would appear to be two separate incidents between Sukah Singh and the appellant, the approach taken by the police would appear to have been that there was only one incident between them and that Sukah Singh's report was, so to say, one side of a coin, and the appellant's report was the other side of the coin, and accordingly the decision to arrest depended on which side of the coin was to be preferred as reasonable. The trial seems also to have been conducted on that basis, so that its aim was to establish whether the first respondent acted reasonably in accepting Sukah Singh's version of the incident. The question whether the first respondent had reasonable suspicion that the appellant committed the offences of robbery and causing hurt against Sukah Singh seems to have been made to depend on whether the first respondent acted reasonably in accepting Sukah Singh's version. Had there been actually two separate incidents, or had there been no report by the appellant, but only Sukah Singh's report, I can see no reason why, on the basis of Sukah Singh's report, the first respondent's initial interview of him and the statement taken from him before the appellant was arrested, it can be said that the first respondent did not or could not have had reasonable suspicion that the appellant committed the alleged offences.

[15] The trial in this case seems to have gone into an enquiry as to who was telling the truth in their reports. On this aspect of the trial the learned trial judge came to the following conclusion at the bottom of p. 23 and the top of p. 24 of her judgment: "I hold that upon a proper assessment of the totality of the evidence the plaintiff's story to be highly improbable. It is my finding that (Sukah Singh) is the more truthful witness". Among the factors that the learned trial judge considered in arriving at that conclusion was the failure of the appellant's counsel to cross-examine Sukah Singh and another witness who claimed to have been with Sukah Singh at the time of the incident in Sukah Singh's report, on their evidence as to the incident, which the judge construed as an acceptance by the appellant of the evidence of those witnesses.

[16] I agree with the submission of the appellant's counsel at p. 12 of his Outline of Submissions, which to my understanding is to the effect that the truth of the contents of the reports or the truth as to what happened on that day was not the issue before the court and had no bearing on the appellant's case and that what was in issue was whether the first respondent at the time of the arrest and in the circumstances prevailing at that time had reasonable suspicion that the appellant had committed the offences of robbery and causing hurt.

[17] This the judge answered at p. 24 of her judgment, after the irrelevant finding on credibility that I have set out, in the following words:

> It is also my finding that the police had not acted arbitrarily and had not abused their statutory power of arrest by arresting the Plaintiff on 21 March 1987. I am of the view that the 1st Defendant was right in taking all of the factors related by him into consideration in making a considered decision as to whose version to accept i.e. as to age, size of the Plaintiff and DW1 etc. in the *(sic)* deciding whether there was a reasonable suspicion of the Plaintiff being concerned in two offences of robbery and assault contrary to section *(sic)* 392 and 323 of the Penal Code.

[18] The factors referred to by the learned judge that the first respondent took into consideration are listed earlier at pp. 17 and 18 of her judgment and are recognized as such and set out briefly by the appellant's counsel at p. 13 of his Outline of Submissions, after asking leave "to examine the facts upon which the 1st respondent contend *(sic)* in evidence he found reasonable

suspicion to effect the arrest of the appellant". For better effect I reproduce the facts, factors or reasons, as listed by the learned trial judge:

(i) the age of the two complainants, Sukah Singh, who was then a thirteen year child, as contrasted with the Plaintiff, a thirty three year old adult;

(ii) the size of the respective complainants i.e. Sukah Singh who was only 4 feet tall, thin and small-built, as contrasted with the Plaintiff who was tall, burly and more heavily built;

(iii) the fact that Sukah Singh was only a schoolboy compared with the Plaintiff who was working and had some authority over the area where the incidents took place;

(iv) the demeanour of the two complainants immediately after they lodged their respective police report; in the case of (Sukah Singh), who appeared frightened and in tears, as contrasted with the Plaintiff who was angry and, according to the police, totally uncooperative;

(v) the fact that there were no visible appearance of any injury on the Plaintiff on the day the report was lodged and statement recorded.

To that list the appellant's counsel added the fact that the first respondent said that in his experience it was impossible for a small boy to beat up an adult.

[19] The appellant's counsel at the end of p. 13 concluded with the submission that "the reasons given by the 1st respondent do not justify arrest of the appellant" (not that the reasons given were not sufficient to raise a reasonable suspicion against the appellant). But counsel did not give any reason for saying what he said. Instead he slid into the need-to- arrest issue to show that it was not necessary to arrest the appellant. I get the impression that that was the reason why he said at the end of p. 13 that the reasons given "do not justify the arrest" and that he was actually fusing the ground-for-arrest issue with the need-to-arrest issue.

[20] I think, from the nature of the reasons given by the first respondent, that they were fair reasons for preferring Sukah Singh's version to the appellant's version or, in other words, for concluding that it was more likely that Sukah Singh was the victim

of the appellant than that the appellant was the victim of Sukah Singh. If there are factors in favour of the appellant's version, these have not been advanced by the appellant's counsel. I can see only one factor and that is the appellant's allegation that it was not Sukah Singh alone who set upon him, but his two brothers as well. But even so the first respondent was entitled, taking all the factors that he did take into account, to arrive at the decision that he arrived at and accordingly to entertain reasonable suspicion that the appellant had committed the offences alleged against him.

A B C

The Need-To-Arrest Issue

[21] In quoting, as I have mentioned, the passage from p. 221 of the *Shaaban* case, learned counsel for the appellant's intention was to highlight the following words of Lord Devlin in support of his contentions on this issue that I have set out:

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> ... To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar.

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[22] The entire passage, which my learned brother cites a part of, and which appears at p. 221, is as follows (with added highlighting):

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> Mr. Gratiaen has criticised the test adopted in the Federal Court. Suffian FJ, who delivered the judgment of the court, said that the information available to the police "was insufficient to prove *prima facie* a case against the plaintiffs under section 304A of the Penal Code or under section 34A of the Road Traffic Ordinance". Mr. Gratiaen submits that this is the test appropriate in actions for malicious prosecution and not in actions for false imprisonment. Whether or not this is so, – and their Lordships do not wish to add any further formulae to those already devised for the action for false imprisonment, – it would appear to be a much stiffer test than the reasonable suspicion, which is the foundation of the power given in section 23(i) (a) of the Criminal Procedure Code. Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove". Suspicion arises at or near the starting-point of an investigation of which the obtaining of *prima facie* proof is the end. When such

G H I

A proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. *To give power to arrest on reasonable*
B *suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar.* There is no serious
C danger in a large measure of executive discretion in the first instance because in countries where common law principles prevail the discretion is subject indirectly to judicial control. There is first the power, which their Lordships have just noticed, to grant bail. There is secondly the fact that in such countries there is available
D only a limited period between the time of arrest and the institution of proceedings; and if a police officer institutes proceedings without *prima facie* proof, he will run the risk of an action for malicious prosecution. The ordinary effect of this is that a police officer either has something substantially more than reasonable suspicion before he arrests or that, if he has not, he has to act
E promptly to verify it. In Malaysia the period available is strictly controlled by the Code. Under section 28 the suspect must be taken before a magistrate at the latest within 24 hours. If the investigation cannot be completed in 24 hours and there are grounds for believing that the accusation or information is well
F founded, under section 117 the magistrate may order the detention of the accused for a further period not exceeding 15 days in the whole. By allowing 15 days after arrest for investigation, the Code shows clearly that it does not contemplate *prima facie* proof as a prerequisite for arrest.

G **[23]** On the same page after that passage Lord Devlin said: "Their Lordships have not found any English authority in which reasonable suspicion has been equated with *prima facie* proof" and, after drawing other distinctions between reasonable suspicion and *prima facie* proof, that is other than that given in the passage
H quoted, concluded: "For these reasons the Board considers that Mr. Gratiaen's criticism of the test applied in the Federal Court was well founded".

[24] Reading the passage as a whole and those subsequent
I statements of Lord Devlin, it seems clear to me that what Lord Devlin intended to do at p. 221 was to show that *prima facie* proof and reasonable suspicion are different things and that the

requirement of reasonable suspicion in s. 23(1)(a) of the Criminal Procedure Code is not to be construed as a requirement of *prima facie* proof, which is "a much stiffer test". Lord Devlin, however, felt it necessary to say that the test of *prima facie* proof is desirable, so that "an arrest should not be made until the case is complete", but if the law were such it could seriously hamper the police. Therefore the law allows the police to arrest on reasonable suspicion, which is not such a bad thing, firstly because of what is stated in the highlighted part of the passage, that is to say, the power to arrest on reasonable suspicion is an executive discretion, the giving of which "does not mean that it is always or even ordinarily to be exercised". In the exercise of it "many factors have to be considered", and examples of these are given. Secondly, arrest on reasonable suspicion is not such a bad thing because of what is stated after the highlighted part to the end of the passage, that is to say, "There is no serious danger in a large measure of executive discretion in the first place" for the reasons that follow these words.

[25] While what is stated in the highlighted part is a desirable thing to be attained, I do not think that the words of Lord Devlin's there ought to be construed as laying down that if an arrest is made when it is not necessary to arrest because the person is not likely to escape or to commit a further crime or to obstruct police enquiries, and investigation can as expeditiously be carried out without arresting him, then the arrest is unlawful so that a cause of action for false imprisonment would be available to the person arrested. If that were the law, it would hamper police action and place an almost impossible burden on a police officer every time before making an arrest of weighing carefully whether an arrest is or is not necessary, a decision which he cannot be sure to be held to be correct should he be sued for false imprisonment for making an unnecessary arrest. I think that when Lord Devlin spoke of "a large measure of executive discretion" and of there being no serious danger in it his Lordship was probably thinking that in practice the executive discretion to arrest may have to be allowed to be liberally exercised.

[26] In my view the highlighted part of the passage that the appellant's counsel relies on does not afford support in the appellant's favour on the need-to-arrest issue.

[27] I would accordingly dismiss the appeal with costs and order that the deposit be paid to the respondents to account of taxed costs.

Zulkefli Makinudin JCA:

Introduction

[28] This is an appeal by the plaintiff against the decision of the High Court at Penang in dismissing the plaintiff's claim against the defendants. In the suit filed the plaintiff seeks to recover damages for wrongful arrest, wrongful detention and malicious prosecution. The grounds of the plaintiff's claim against the defendants are based on abuse of power, negligence and/or breach of statutory duty.

Background Facts Of The Case

[29] The relevant background facts of the case are as follows:

The plaintiff was at the material time, a technician attached to the Botanical Gardens, Penang. The first defendant was at the material time, a Police Inspector serving as an investigating officer at the Pulau Tikus Police Station, Penang and an employee of the second defendant, the Government of Malaysia.

[30] On 21 March 1987, two police reports were lodged at Pulau Tikus Police Station. The first police report namely Report No. 641/87, was lodged by one Sukah Singh, then 13 years old, a schoolboy. Sukah Singh alleged that at about 10am on 21 March 1987 whilst he was selling peanuts at the Botanical Gardens, Penang ("the said gardens"), a man whom he knew as "Hamid" (the plaintiff), who was then riding a bicycle, suddenly knocked into him from the rear, causing him to fall. According to Sukah Singh, the plaintiff then assaulted him and directed him to empty his pockets. He obeyed. Sukah Singh said the plaintiff then grabbed his monies amounting to RM14 in all.

[31] The second police report, namely Report No. 642/87, was lodged by the plaintiff, then aged 33. In this report the plaintiff alleged that at about 10.30am on 21 March 1987 whilst on his way to his office, the plaintiff was blocked by a Sikh boy named Sukah Singh and an Indian boy. They refused to let him go to work. The Sikh boy threatened him and told him "he cannot work here". The plaintiff pedalled on nevertheless, to work. At about

12.40pm the same day, the plaintiff on his way back home cycled towards the main gate of the said gardens. The Sikh boy then, together with his two brothers suddenly appeared and shut the gates towards which the plaintiff was travelling. The plaintiff was not able to avoid the gate. He crashed into the gate and he fell. He was injured. His bicycle was damaged. Whilst on the ground, the plaintiff alleged the Sikh boy together with his two brothers attacked the plaintiff. They kicked him. When the plaintiff later got up and pushed his bicycle away, one of them showed the plaintiff a knife and told him, "nanti awak jaga awak tidak boleh datang ke kerja di Pejabat Kebun Bunga, Pulau Pinang."

[32] The first defendant, when confronted with the two reports choose to believe Sukah Singh's version over that of the plaintiff. And so, he arrested and detained the plaintiff on 21 March 1987 for investigations. Sukah Singh was released after a statement was recorded from him on 21 March 1987 itself.

[33] The plaintiff was detained for a period of nine days. The plaintiff dissatisfied with his detention sought compensation from the defendants for the said arrest and detention. The plaintiff contended in the court below that the first defendant had acted wrongfully and unlawfully and had abused the powers of his office by arresting and placing him under detention for nine days. The learned trial judge rejected his contention and ruled that the police had not acted arbitrarily and had not abused their statutory power of arrest by arresting the plaintiff on 21 March 1987. The learned trial judge held the view that the first defendant was right in taking all of the relevant factors in deciding whether there was a reasonable suspicion of the plaintiff being concerned in the two offences of robbery and voluntarily causing hurt contrary to ss. 392 and 323 of the Penal Code.

Decision On Appeal

[34] For the plaintiff it was submitted before us that there are serious errors of law in the findings made by the learned trial judge in dismissing the plaintiff's claim. Learned counsel for the plaintiff focused his argument on two main points as follows:

[35] Firstly, it is the contention of the plaintiff that the first defendant had no power at that time to arrest the plaintiff for an offence under s. 323 of the Penal Code which is a non-seizable offence.

[36] Secondly, it is the contention of the plaintiff that the first defendant had no grounds which could raise reasonable suspicion on his part which justified him in the exercise of his discretion to arrest the plaintiff for both offences as alleged.

[37] On the first point raised by the plaintiff, it was submitted that an offence under s. 323 of the Penal Code is a non-seizable offence. In such a case the police shall not arrest the alleged offender without a warrant. Under s. 2 of the Criminal Procedure Code ("CPC"), a "non-seizable offence" means an offence for which a police officer may not ordinarily arrest without a warrant according to the third column of the First Schedule. It was further argued that under s. 108 of the CPC, whenever an information relating to the commission of an offence relates to the commission of a non-seizable offence the informant shall be referred to a Magistrate. Section 108(2) of the CPC expressly states that no police officer shall in a non-seizable case exercise any of the special powers in relation to police investigations given by chapter XIII of the CPC without the order of the Public Prosecutor. Chapter XIII of the CPC includes the provisions of ss. 112 to 117 of the CPC.

[38] Learned counsel for the plaintiff contended that contrary to the above mentioned express provisions of the CPC, the first defendant had arrested the plaintiff without a warrant and had wrongfully detained and remanded him for a period of nine days for investigation of an offence under s. 323 of the Penal Code which is clearly a non-seizable offence. It was also contended for the plaintiff that the learned trial judge had erred in law when she ruled that the arrest of the plaintiff for both offences of robbery and voluntarily causing hurt under ss. 392 and 323 of the Penal Code was not unlawful. It is the plaintiff's case that the arrest and detention of the plaintiff for nine days for the purpose of investigating both offences is completely unlawful and must be so declared.

[39] On the first point raised by the plaintiff it must be noted at the outset the offence under investigation by the first defendant in this case is not only the offence under s. 323 of the Penal Code, but also an offence under s. 392 of the Penal Code, which is a seizable offence. The first defendant (DW4) in his evidence had stated as follows:

> Saya seterusnya telah tangkap plaintif kerana disyaki telah melakukan samun dan mengakibatkan cedera ke atas DW1 ('Sukah Singh').

(See p. 110 of the appeal record).

[40] I am of the view since the plaintiff had been investigated on suspicion of committing the offence of robbery under s. 392 of the Penal Code and being a seizable offence, the first defendant was therefore justified in the circumstances of the case to have arrested the plaintiff without a warrant. It is untenable for the plaintiff to contend just because the plaintiff had also been investigated at the same time for an offence of voluntarily causing hurt under s. 323 of the Penal Code, being a non-seizable offence that a warrant is needed to effect the arrest on the plaintiff. Both the said police reports were lodged by the plaintiff and Sukah Singh on the same day on 21 March 1987 and the two offences under ss. 392 and 323 of the Penal Code were found to have been committed in the same transaction. In my view there need be only one arrest effected by the first defendant on the plaintiff and for this the first defendant had lawfully exercised his power by arresting the plaintiff with a view to investigation for an offence under s. 392 of the Penal Code. I do not think the first defendant needed a warrant with a view to effecting another arrest on the plaintiff for investigation of an alleged offence under s. 323 of the Penal Code when the plaintiff had already been lawfully arrested and detained for committing the alleged offence of robbery under s. 392 of the Penal Code. Furthermore it has to be stated here there is an Explanatory Note No. (2) to the First Schedule of the CPC which states that the entries in the Third Column of the said Schedule are not intended in any way to restrict the powers of arrest without warrant which may be lawfully exercised by Police Officers.

[41] It is also to be noted that the first defendant (DW4) as the investigating officer of the case had referred the result of his investigation to the Deputy Public Prosecutor ("DPP") for further directions. On this point DW4 had this to say:

> Saya merujuk kertas siasatan kepada Timbalan Pendakwa Raya. Saya berjumpa dengan Timbalan Pendakwa Raya. Timbalan Pendakwa Raya telah mengarahkan plaintif dituduh di bawah seksyen 392 dan 323 Kanun Keseksaan.

(See p. 116 of the appeal record).

[42] I am of the view if s. 108(2) of CPC requires reference to the DPP for an investigation of an offence under s. 323 of the Penal Code, the DPP had in fact taken cognizance when the DPP instructed the police in this case to charge the plaintiff for offences under ss. 323 and 392 of the Penal Code. The investigation therefore is not contrary to s. 108 of the CPC. In fact the total nine days remand order that was first granted by the Registrar of the Sessions Court and subsequently by the President of the Sessions Court in this case was for the purposes of investigation for both offences under ss. 392 and 323 of the Penal Code and not s. 392 of Penal Code alone. For this reason it is my judgment that the first defendant cannot be held responsible for wrongful arrest and false imprisonment.

[43] On the second point raised by the plaintiff it relates more to the factual aspect of the case as to whether or not the first defendant had the reasonable suspicion enough to justify the exercise of discretion to arrest the plaintiff. Section 23(i)(a) of the CPC speaks about "reasonable suspicion" before an arrest can be made. In the Privy Council case of *Shaaban & Ors. v. Chong Fook Kam* [1969] 2 MLJ 219, Lord Devlin held that the test to be applied in the exercise of the power under s. 23(i)(a) of the CPC is the reasonable suspicion test, and not the *prima facie* proof test. The learned trial judge had rightly adopted the correct test having referred to the principle as set out in *Shaaban*'s case and in her judgment she had quoted the relevant passage of the said case as follows:

> Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end. When such proof has been obtained the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is completed. But if arrest before that is forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion.
>
> In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar.

There is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles apply the discretion is subject indirectly to judicial control. There is first the power to grant bail. There is secondly the fact that in such countries there is available only a limited period between the time of arrest and the institution of proceedings; and if a police institutes proceedings without *prima facie* proof, he will run the risk for malicious prosecution. The ordinary effect of this is that a police officer either has something substantially more than reasonable suspicion before he arrests or that, if he has not, he has to act promptly to verify it. In Malaysia the period available is strictly controlled by the Code. Under s. 28 the suspect must be taken before a magistrate at the latest within 24 hours. If the investigation cannot be completed within 24 hours and there are grounds for believing that the accusation or information is well founded, under s. 117 the magistrate may order the detention of the accused for a further period not exceeding 15 days in the whole. By allowing 15 days after arrest for investigation, the Code shows clearly that it does not contemplate prima facie proof as a prerequisite for arrest.

...

There is another distinction between reasonable suspicion and *prima facie* proof. *Prima facie* proof consists of admissible evidence. Suspicion can take account matters that could not be put in evidence at all.

(See pp. 22-23 of the appeal record).

[44] I am of the view the first defendant had acted reasonably in his decision before arresting the plaintiff at about 3.15pm on 21 March 1987. At the time of arrest the "reasonable suspicion" was that the first defendant believed the report of Sukah Singh (DW1) in his report No. 641/87 as being true and not the report No. 642/87 lodged by the plaintiff. The first defendant in his evidence before the trial judge had given an account as to what he did in respect of the said two police reports. The first defendant stated that he had conducted a preliminary investigation by interviewing the plaintiff and Sukah Singh. He directed Sergeant Major Zainol (DW3) to record the statement of Sukah Singh. He took into consideration the plaintiff's body size, and said that through his experience as a police officer Sukah Singh cannot be the aggressor. The plaintiff alleged that he was assaulted but the first defendant observed there were no marks of injuries at all sustained

by the plaintiff. The first defendant further consulted his superior, Superintendent Leong Ho Chiew and they were both satisfied that the report by Sukah Singh was reasonable. (See pp. 107-110 of the appeal record).

[45] Learned counsel for the plaintiff in his submission before us took up as an issue that the learned trial judge was wrong in law when she expressly held that the failure on the part of counsel for the plaintiff to cross-examine Sukah Singh (DW1) as to the accuracy of the contents of the police reports amounted to acceptance on the part of the plaintiff of the complaint made against him by DW1. Learned counsel for the plaintiff further contended that whether the reports are true or not would have no bearing on the plaintiff's case. It is really what the first defendant did preliminary to satisfy himself for the need to arrest at the material time which is important. Against this contention of the plaintiff I wish to state here that the principle of law on this point is well established as referred to in the case of *Aik Ming (M) Sdn. Bhd. & Ors. v. Chang Ching Chuen and Another Appeal* [1995] 3 CLJ 639 wherein Gopal Sri Ram, JCA in delivering the judgment of the Court of Appeal and in applying the rule as laid down in *Browne v. Dunn* [1893] 6 R 67 at p. 794 had this to say:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal cases. It applies with equal force in the trial of civil cases as well.

[46] With regard to the above proposition of law learned counsel for the plaintiff however submitted that in relation to the present case emphasis should be placed on the words 'party's case' and according to him it is different in respect of claim for unlawful arrest and detention. He was of the view what is of essence is to consider whether the police had good reasons at the time of arrest to effect such arrest. With respect I find such a contention is without merit. There is no difference. The law applies across the board, otherwise different set of rule of evidence have to be applied for different causes of action.

[47] It is my judgment that the learned trial judge was right in deciding that the failure of the plaintiff's counsel to put his case or challenge the evidence of Sukah Singh (DW1) and his friend, Kandhiah (DW2) who were both at the scene of the incident is fatal to the plaintiff's case. In my view when the learned trial judge accepted the truth of DW1's and DW2's evidence because the plaintiff failed to contradict their evidence during cross-examination, then the first defendant cannot be said to be wrong in accepting DW1's report as reasonable.

[48] For the plaintiff, it was argued that he had in fact put his case and challenged the defendants' version of the case when the first defendant (DW4) was cross-examined in detail in respect of the conduct of his investigation. However, DW4 is not the material witness. He is only carrying out the investigation over the report by DW1. The material for investigation is the police report by DW1, which DW4 relied on and he had found it to be true. DW1 and DW2 are in fact the material witnesses who had said the plaintiff assaulted and robbed DW1. The plaintiff's version of the incident on 21 March 1987 was never put to DW1 and DW2. In the circumstances of the case the learned trial judge was correct in accepting DW1's version. It therefore follows that the decision to arrest the plaintiff was lawful and with reasonable cause. It was entirely upon the first defendant's discretion to arrest the plaintiff. What is reasonable to the first defendant is for him to determine.

[49] I shall now deal with other ancillary points raised by the plaintiff in this appeal. It was contended for the plaintiff that a police officer need not arrest a person if investigation can proceed without his arrest and detention. It was submitted that in this case there is not an iota of evidence led by the defendants as to why investigation cannot be carried out without the first defendant arresting and detaining the plaintiff. On this point I do not think the defendant has a burden to lead such evidence if it can be shown that the decision by the first defendant to arrest the plaintiff was lawful and with reasonable cause. Whether the first defendant did not do this or did not do that is immaterial. What is important is whether the arrest is reasonable and not the manner of investigation.

[50] Learned counsel for the plaintiff in his submission before us made an attempt to show that the learned trial judge failed to appreciate the true extent of the provision of s. 23 of the CPC. He contended that s. 23 of CPC says a police officer "may arrest". It does not say "must arrest". In my view the word "may" connotes a discretion and here in this case is the discretion of the first defendant as whether to arrest the plaintiff or not. The first defendant had arrested the plaintiff because he believed DW1's police report as reasonable. He had reasonable suspicion that the plaintiff committed the offences and arrested him. Whether he has reasonable cause is a question fact for the learned trial judge to determine and in this case the learned trial judge had made a finding of fact that the arrest of the plaintiff was lawful in the circumstances of the case. The Police Report No. 641/87 by DW1 is the basis of the investigation by the first defendant and as had been held in *Shaaban*'s case *(supra)* suspicion can take into consideration matters that could not be put in evidence at all.

[51] For the plaintiff it was also submitted that the first defendant as the investigating officer had failed to look at the plaintiff's bicycle which would have indicated damage consistent with the plaintiff's story. In his evidence the plaintiff had said the first defendant asked his younger brother (PW2) to go back to his house and bring the bicycle to the first defendant for him to investigate. On this issue I find that learned counsel for the plaintiff never put the question to the first defendant whether the bicycle was brought by PW2 to him and whether he had investigated in respect of the bicycle. No evidence was led in this respect by the plaintiff and it would be too late in the day for the plaintiff to raise the issue now. The principle of law on this point as laid down in the case of *Browne v. Dunn (supra)* would equally apply here.

Conclusion

[52] For the reasons already stated I would dismiss the plaintiff's appeal with costs and order the deposit to be paid to the defendants on account of taxed costs.

[53] My learned brother Mohd. Ghazali bin Mohd. Yusoff, JCA has seen this judgment in draft and has conveyed his agreement thereto.